88-888 (1)

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN M. POINDEXTER, OLIVER L. NORTH, and ALBERT HAKIM,

Petitioners,

v.

— UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether allegations that a grand jury was exposed to, and made use of, widely disseminated immunized testimony in violation of the Fifth Amendment, 18 U.S.C. § 6002, and *Kastigar* v. *United States*, are effectively unreviewable in the event of a conviction and, if so, whether the denial of a motion to dismiss an indictment based on such exposure and use is subject to interlocutory review?

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John M. Poindexter, Oliver L. North, and Albert Hakim petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit rendered in this case on September 30, 1988.

OPINIONS BELOW

The decision of the court of appeals dismissing petitioners' appeals for lack of jurisdiction (App. 1a) is reported at 859 F.2d 216. The relevant opinion and orders of the district court (App. 14a, 17a, and 49a) are unreported.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered September 30, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ; nor shall any person . . . be compelled in any criminal case to be a witness against himself, . . .

Title 18, Section 6002 of the United States Code, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Title 28, Section 1291 of the United States Code, provides in relevant part:

> The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

STATEMENT OF THE CASE

A. Introduction

Petitioners seek review of a decision of the United States Court of Appeals for the District of Columbia Circuit dismissing, for lack of jurisdiction, petitioners' appeals from the district court's denial of their motion for a hearing into taint of the grand jury resulting from exposure to petitioners' immunized testimony, and for dismissal of the indictment.

The issues presented by this petition are already before this Court on writ of certiorari from the Second Circuit's decision in *United States* v. *Midland Asphalt Corp.*, 840 F.2d 1040 (2d Cir.), *cert. granted*, 108 S. Ct. 2869 (1988). Counsel understand that *Midland Asphalt* has been set for argument on January 17, 1989. Petitioners respectfully request that this petition be held for resolution pending disposition of that case.

B. Statement of Facts

On March 16, 1987, a grand jury returned an indictment against petitioners John M. Poindexter, Oliver L. North, and Albert Hakim, along with Richard V. Secord, who is not a petitioner here. Less than a year earlier, petitioners had been compelled, under grants of immunity pursuant to 18 U.S.C. § 6002, to testify before Congress on the precise matters at issue in the indictment. Petitioners' testimony infused the community. It was carried live on radio and television across the nation and rerun on evening news shows. It was reprinted in newspapers and magazines. The testimony engendered unprecedented nationwide press coverage and for months thereafter and continuing to date has been the subject of widely disseminated newspaper, television and radio reports, as well as books and magazines.

Following indictment, petitioners moved to dismiss the indictment, *inter alia*, on the ground that grand jury ex-

posure to and use of their immunized testimony had "tainted" the grand jury in violation of *Kastigar* v. *United States*, 406 U.S. 441 (1972). In a series of rulings, the trial court refused to conduct a full pretrial hearing on grand jury taint; refused to consider or rule upon the extent of grand juror exposure to immunized testimony, whether through the media or the testimony of witnesses; and refused to dismiss the indictment. (App. 14a, 17a and 49a).

In the court of appeals, petitioners sought review of two orders and a portion of a third entered by the district court.[1] As the court of appeals stated it, "The thrust of each appeal is the district court's denial of appellants' joint motion to dismiss the indictment and the alleged failure of the district court to accord appellants a 'full and fair pretrial . . . hearing on grand jury taint.'" (App. 2a).

The court held that it was without jurisdiction under 28 U.S.C. § 1291 and declined to reach the question of grand jury taint raised by the appeals. It reviewed the general rule against piecemeal appeals in criminal proceedings and concluded that the decision of the trial court did not constitute the final decision required under § 1291. The appellate court ruled that "[i]f appellants' claims may effectively be reviewed on appeal from a final judgment of conviction, there is no justification for departing from the general prohibition against piecemeal review." (App. 5a).

The court of appeals then considered whether post-judgment review of the claims raised would be foreclosed by this Court's decision in *United States* v. *Mechanik*,

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[1] Petitioners filed timely notices of appeal from the trial court's rulings. Only petitioner North appealed the trial court's denial of his motion for reconsideration of the earlier orders. By the time of his motion for reconsideration, the trial court had severed the trials of the three petitioners and ordered petitioners Poindexter and Hakim to cease participating in proceedings. *See* Orders of June 8, 1988, and June 24, 1988.

475 U.S. 66 (1986). Petitioners argued that under *Mechanik* their right to review of the claim of grand jury taint might be lost unless it was afforded prior to trial. The D.C. Circuit acknowledged that the Court of Appeals for the Ninth Circuit had read *Mechanik* broadly to *preclude* most post-conviction review of alleged grand jury error, citing *United States* v. *Benjamin*, 812 F.2d 548 (9th Cir. 1987); under *Benjamin*, because a court would be unable to afford defendants any post-conviction relief, a trial court's denial of a motion to dismiss is immediately appealable as a collateral order. The D.C. Circuit noted, however, that the circuits are divided, and that the Ninth Circuit "stands alone . . . in reading *Mechanik* so broadly as to provide for interlocutory appeals raising issues of grand jury abuse." (App. 7a).

In contrast to the Ninth Circuit, the court of appeals noted, the Second Circuit in *Midland Asphalt* addressed a claim under Rule 6(e), Fed. R. Crim. P., and concluded that the different purposes that underlie Rules 6(d) and 6(e) sufficiently distinguish *Mechanik* so as not to require interlocutory review of claimed violations of Rule 6(e). As the D.C. Circuit stated, "The [Second Circuit] concluded that the Rule 6(d) violation found in *Mechanik*, which affected only the grand jury's ability to make a fair determination of probable cause, differed significantly from violations of Rule 6(e), a rule that serves the 'very different function' of 'protect[ing] society's interest in keeping secret the identity of grand jury witnesses and persons under investigation.'" (App. 8a). The Second Circuit concluded that a violation of Rule 6(e), unlike a violation of Rule 6(d), is not rendered harmless simply because the defendant is convicted. Since post-conviction review of a Rule 6(e) claim would be available, the appeal was dismissed.

The D.C. Circuit further noted that the First, Seventh and Tenth Circuits also have declined to permit interlocutory appeals of denials of motions pertaining to abuse

of the grand jury process, citing *United States* v. *LaRouche Campaign*, 829 F.2d 250 (1st Cir. 1987); *United States* v. *Daniels*, 848 F.2d 758, 760 (7th Cir. 1988); and *United States* v. *Taylor*, 798 F.2d 1337 (10th Cir. 1986). The D.C. Circuit reviewed each of these decisions and aligned itself with the analysis of the First and Seventh Circuits:

> We agree with the view expressed by the First Circuit in *LaRouche* and the Seventh Circuit in *Daniels*. Even if we assume that *Mechanik* would foreclose post-judgment review of the claims raised here, an interlocutory appeal would nevertheless not be justified. The collateral order doctrine permits appeals from orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action *too important* to be denied review. . . ." *Cohen*, 337 U.S. at 546 (emphasis added). Thus, if this court, on appeal following entry of a judgment of conviction, declines to review the claims of error asserted here, it will be because the court will have concluded that the asserted error resulted in no unfair prejudice to appellants and, as a consequence, was harmless beyond a reasonable doubt. If the claimed error will not be important enough to warrant correction on appeal from final judgment, it most assuredly is not important enough to warrant the extraordinary step of an interlocutory appeal. *LaRouche Campaign*, 829 F.2d at 254; *Daniels*, 848 F.2d at 760.

(App. 10a-11a). The court of appeals therefore ruled that it was without jurisdiction to entertain petitioners' appeals.

REASONS FOR GRANTING THE WRIT

Essentially the same issue as that presented in this petition—"whether allegations of grand jury abuse are effectively unreviewable post-judgment and, if so, whether the denial of a motion to dismiss an indictment based upon such abuse is subject to interlocutory review" (App.

6a)—is pending before this Court in *Midland Asphalt*. To date, at least five courts of appeals other than the District of Columbia Circuit have addressed the issue. *See United States* v. *Daniels*, *supra*; *United States* v. *Midland Asphalt Corp.*, *supra*; *United States* v. *LaRouche Campaign*, *supra*; *United States* v. *Benjamin*, *supra*; *United States* v. *Taylor*, *supra*. In the decision that is the subject of this petition, the D.C. Circuit joined this list and expressly followed the decisions of the First and Seventh Circuits. This Court's decision to grant certiorari in *Midland Asphalt* on the question that currently divides these courts leaves no room for doubt as to the importance of the question presented.

In *Midland Asphalt* the Second Circuit ruled that violations of Rule 6(e), Fed. R. Crim. P., occurring during a grand jury investigation are not necessarily rendered harmless by conviction, unlike the claimed violation of Rule 6(d), Fed. R. Crim. P., at issue in *Mechanik*. Accordingly, the Second Circuit held that a condition for application of the collateral order doctrine was not met. The court stated: "[w]e do not believe that *Mechanik* precludes a federal court of appeals from exercising post-trial review of an order denying a motion to dismiss an indictment for violation of Rule 6(e). By the same token, we believe a Rule 6(e) challenge does not qualify for immediate review under the collateral order doctrine." 840 F.2d at 1046.

The D.C. Circuit offered a somewhat different analysis of the application of *Mechanik*. It did not distinguish among types of grand jury issues but ruled broadly that even if *Mechanik*'s harmless error analysis were to apply to the claims raised by petitioners, interlocutory review would not be available because claims too insignificant to survive a harmless error test would be too insignificant to warrant "the extraordinary step of an interlocutory appeal." (App. 11a). This Court's resolution of the con-

flict between the decisions of the Ninth Circuit and the decision of the Second Circuit in *Midland Asphalt* with respect to the reach of *Mechanik* and the implications of that decision for interlocutory review will have direct bearing on the position taken by the D.C. Circuit.

Moreover, petitioners submit that the grand jury issues raised in this petition present an even stronger case for interlocutory review than those presented in *Midland Asphalt* because of the critically important constitutional rights at stake. The decision of the D.C. Circuit prevents petitioners not merely from challenging the trial court's bottomline decision not to dismiss the indictment, but also its decision not to conduct a fair pretrial hearing on the subject. At issue here is the propriety of proceeding to trial based on an indictment returned by grand jurors who, petitioners claim, were thoroughly exposed to their immunized testimony both directly, through the press, and indirectly, through the testimony of one "tainted" witness after the next. Even though this case involves the most widely disseminated immunized testimony in history, compelled to be given on national television by the same government that returned this indictment, the trial court refused petitioners the opportunity to make an affirmative showing of repeated grand jury "taint" by witnesses (even though the burden of proving a lack of "taint" under *Kastigar* rests with the government); refused to permit inquiry into whether grand jurors were asked to file reports of exposure to the immunized testimony; refused to grant access to such reports; and refused to permit any inquiry of grand jurors into their exposure to publicity regarding immunized testimony. The court also foreclosed inquiry regarding at least two replacement grand jurors who joined the grand jury four and five months *after* the congressional hearings ended, but who were not questioned in any detail about their exposure to those proceedings prior to their being sworn as jurors. Instead, without *any* even

remotely adequate inquiry, or any meaningful showing by the government, the trial court found that the petitioners' testimony "was not submitted to the grand jury in any form," (App. 45a), and that the immunized testimony "played no part in the grand jury's unanimous decision to indict." (App. 45a).

By its failure to hold the necessary inquiry prior to trial, the trial court forces petitioners to trial on an indictment that any fair hearing would disclose to be directly violative of the protections of the Fifth Amendment. The ruling of the trial court also seriously impedes any reasonable inquiry into grand jury "taint". The years of delay caused by the decision not to conduct a thorough *pretrial* inquiry, coupled with the government's apparent failure to keep proper contemporaneous records of the grand jurors' exposure, will grievously frustrate efforts to determine the extent to which individual grand jurors in fact were exposed to petitioners' immunized testimony. Trial testimony by petitioners, if there is any, will further confuse the recollections of grand jurors. Petitioners nevertheless are foreclosed from bringing these matters to the attention of the appellate court, perhaps forever, in light of the court of appeals ruling at issue here.

CONCLUSION

For the foregoing reasons, the petition should granted or held for resolution in light of this Court's d cision in *Midland Asphalt*.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed September 30, 1988

Nos. 88-3057, *et al.*

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER, *et al.*,
Appellants

On Appeal From The United States District Court
For The District of Columbia
(Criminal No. 88-0080)

On Motions To Dismiss and
Petition For Writ of Mandamus

Jeffrey Toobin, *Robert C. Longstreet*, Associate Counsel, *Herbert J. Stern*, Special Counsel, and *Lawrence E. Walsh*, Independent Counsel, were on the pleadings for the Office of the Independent Counsel.

Frederick Robinson, *Stephen M. McNabb*, *Joseph T. Small, Jr.*, and *Richard W. Beckler*, were on the pleadings for appellant John M. Poindexter.

Mark D. Attorri, Clement R. Gagne, III, Lawrence M. Wechsler, and *N. Richard Janis,* were on the pleadings for appellant Albert Hakim.

John D. Cline, Nicole K. Seligman, Terrence O'Donnell, Barry S. Simon, and *Brendan V. Sullivan, Jr.,* were on the pleadings for appellant Oliver L. North.

Rosemary Herbert, John A. Powell, Kate Martin, Todd L. Burlingame, Theresa Fenelon, and *Kevin R. Sullivan,* were on the brief for *amicus,* American Civil Liberties Union.

Before: BUCKLEY, D.H. GINSBURG and SENTELLE, *Circuit Judges*

Opinion Per Curiam.

PER CURIAM: Appellants John Poindexter, Oliver North and Albert Hakim have appealed various pre-trial orders of the district court. Appellants also seek extraordinary relief by way of mandamus. Arguing that the court is without jurisdiction to entertain the appeals, the United States has moved to dismiss. Because we agree that we are without jurisdiction to review the orders that are the subject of these interlocutory appeals, we grant the motions of the United States and dismiss. We also deny appellants' petition for a writ of mandamus.

I

In the appeals, appellants seek review of two orders, and a portion of a third, entered by the district court.[1] The thrust of each appeal is the district court's denial of appellants' joint motion to dismiss the indictment and the alleged failure of the district court to accord appellants a "full and fair pretrial . . . hearing on grand jury taint." The "taint" about which appellants complain

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[1] In No. 88-3105, appellant North has appealed the district court's denial of reconsideration of the earlier orders.

is the alleged grand jury exposure to and use of highly publicized testimony given by each of appellants before an investigative committee of Congress. Each of appellants had testified under a grant of immunity pursuant to 18 U.S.C. § 6002 (1982). Appellants contend that the alleged use of that testimony by the grand jury is therefore in violation of *Kastigar v. United States*, 406 U.S. 441 (1972).

We do not reach the question of grand jury taint raised by the appeals as we hold that we are without jurisdiction under 28 U.S.C. § 1291. Section 1291 expressly limits the jurisdiction of the Courts of Appeals to "final decisions of the district courts." The Supreme Court has long held that the policy of finality embodied in this section is "inimical to piecemeal appellate review" and that this policy is "at its strongest" in the field of criminal law. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982). Thus, except for a very limited number of cases that fall within the "collateral order" exception of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), appeals in criminal cases must await the termination of the proceedings by final judgment. *DiBella v. United States*, 369 U.S. 121, 124 (1962). Appellants contend that the orders on appeal satisfy the collateral order exception.

Orders that fall within the *Cohen* exception "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). On only three occasions has the Supreme Court applied the *Cohen* exception to depart from the general prohibition against piecemeal appellate review in criminal cases. *See Helstoski v. Meanor*, 442 U.S. 500 (1979) (denial of Congressman's motion to dismiss a prosecution prohibited by the speech and debate clause); *Abney v. United States*, 431 U.S. 651 (1977)

(denial of motion to dismiss indictment on double jeopardy grounds); *Stack v. Boyle*, 342 U.S. 1 (1951) (denial of motion to reduce bail). Each of these cases, in addition to satisfying the other requirements of *Cohen*, involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978).

Appellants contend that the use of their compelled testimony violates their fifth amendment rights. In their view, the self-incrimination protection clause of the fifth amendment, like the double jeopardy clause construed in *Abney*, and the speech or debate clause[2] construed in *Helstoski*, confers a right not to be tried that must be upheld prior to trial if it is to be enjoyed at all. Specifically, appellants argue that they are constitutionally and statutorily protected from having their immunized testimony used against them "in any way." Thus, argue appellants, if they are forced to go to trial on an indictment which, in their view, is impermissibly "tainted" by the grand jury's use of immunized testimony, that testimony will have been improperly "used against them." We disagree.

The fifth amendment privilege against self-incrimination insures that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The privilege therefore normally permits a witness to remain silent and refuse to give testimony when called upon to testify in a manner that would incriminate himself. The immunity statute, 18 U.S.C. § 6002, under which appellants were compelled to testify before the Congressional Committee, reflects a Congressional choice to protect that privilege in defined circumstances by compelling the witness to give evidence but immunizing the witness against any direct or indirect use of that-

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[2] U.S. Const., art. I, § 6, cl. 1.

testimony in any criminal case.[3] By its terms the statute confers only *use* immunity. It does not confer transactional immunity under which the witness could not be prosecuted at all for the transaction about which he testifies. As the Supreme Court held in *Kastigar*, *supra*, this statute affords the witness the same protection as the fifth amendment "by assuring that the compelled testimony can in no way lead to the *infliction of criminal penalties.*" *Kastigar*, 406 U.S. at 461 (emphasis added). The defendant in *Kastigar* had sought transactional immunity. But the Court held that, in order to compel incriminating testimony, the law need grant an immunity commensurate with that afforded by the fifth amendment privilege not a broader one. "The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted." *Id.* at 453. Thus, appellants' claim that the immunity affords them a right not to be prosecuted at all is ill-founded.

Appellants may ultimately be correct in their assertion that if the grand jury's probable cause determination was "tainted" by the use of immunized testimony, dismissal of the indictment will be required to remedy the harm. Even when vindication of the defendant's rights requires dismissal of the charge altogether, however, an interlocutory appeal is not automatically justified. *United States v. Hollywood Motor Car Co.*, 458 U.S. at 269. If appellants' claims may effectively be reviewed on appeal from a final judgment of conviction, there is no justification for departing from the general prohibition against piecemeal review.

Appellants contend that post-judgment review of the claims raised here will be foreclosed by the decision of the Supreme Court in *United States v. Mechanik*, 475

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[3] The only exception to this immunity applies to a prosecution for perjury, false statement, or otherwise failing to comply with the immunity order.

U.S. 66 (1986). In *Mechanik*, the Supreme Court was presented with a post-judgment appeal that raised the issue of whether a violation of Rule 6(d) of the Federal Rules of Criminal Procedure provided a basis for dismissal of an indictment. That rule limits the persons who may be present in the grand jury session to certain necessary court officials and the one witness then under examination. Contrary to this limitation, two witnesses before the *Mechanik* grand jury were present during each other's testimony. The defendants raised that error after the final verdict of guilty. The District Court denied their post-verdict motion for dismissal of the indictment. *United States v. Lill*, 511 F. Supp. 50 (S.D.W. Va. 1980). The Fourth Circuit reversed. *United States v. Mechanik*, 735 F.2d 136 (4th Cir. 1984).

The Supreme Court reasoned that the purpose of Rule 6(d) is to protect a defendant from having to stand trial when there is no probable cause to believe him to be guilty. The return of a guilty verdict, however, meant that there in fact had been probable cause and as a result, "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Mechanik*, 475 U.S. at 70.

In the present case, appellants contend that *Mechanik* makes post-judgment review of their claim of grand jury taint unavailable. If they are acquitted, the argument proceeds, the claimed error is moot. If they are convicted, then under their view of *Mechanik*, the error will be deemed harmless. Either way, they say, the right to review is lost unless it is afforded now. Again, we disagree.

To date, five circuits have addressed the issue whether allegations of grand jury abuse are effectively unreviewable post-judgment and, if so, whether the denial of a motion to dismiss an indictment based upon such abuse is subject to interlocutory review.

Appellants place great reliance upon the views of th Ninth Circuit Court of Appeals, which has construe *Mechanik* broadly so as to preclude most post-convictio review of alleged grand jury error. In *United States v Benjamin*, 812 F.2d 548 (9th Cir. 1987), for example the defendants moved to dismiss the indictment on th ground that the government had violated the secrec requirement of Rule 6(e) of the Federal Rules of Crim inal Procedure by disclosing certain grand jury mate rials to a government witness who also had a separat civil suit pending against the defendants.

The court concluded that the alleged violations of Rul 6(e) implicated the grand jury's decision to indict, an that such violations would, therefore, be rendered harm less if the petit jury found appellants guilty beyond reasonable doubt. Because the court would be unable t afford the defendants any post-conviction relief, it hel that the district court's denial of the motion to dismis was immediately appealable as a collateral order. *Id.* a 553.[4]

The Ninth Circuit stands alone, however, in readin *Mechanik* so broadly as to provide for interlocutory a peals raising issues of grand jury abuse. In *Unite States v. Midland Asphalt Corp.*, 840 F.2d 1040 (2 Cir.), *cert. granted*, 56 U.S.L.W. 3879 (U.S. 1988), t Second Circuit considered an interlocutory appeal fro the denial of a motion to dismiss an indictment bas upon alleged violations of Rule 6(e). Departing from t position taken by the Ninth Circuit, the court in *Midla* concluded that the different purposes that underlie Ru 6(d) and Rule 6(e) sufficiently distinguish *Mechan*

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[4] *Accord United States v. Dederich*, 825 F.2d 1317 (9th Cir. 198 In *Dederich*, the Ninth Circuit held a denial of a motion to dism an indictment for prosecutorial misconduct in the grand jury sta to be an appealable interlocutory order on the *Benjamin* rationa Significantly, however, that case also held that defendants' i munity claim could not be the subject of a pre-judgment appeal

so as not to require interlocutory review of claimed violations of Rule 6(e).

The court concluded that the Rule 6(d) violation found in *Mechanik*, which affected only the grand jury's ability to make a fair determination of probable cause, differed significantly from violations of Rule 6(e), a rule that serves the "very different function" of "protect[ing] society's interest in keeping secret the identity of grand jury witnesses and persons under investigation." *Id.* at 1046. Thus, unlike a violation of Rule 6(d), a violation of Rule 6(e) is not rendered harmless simply because the defendant is convicted. Indeed, concluded the Second Circuit, the more egregious the violation of Rule 6(e), the more *likely* it becomes that the petit jury will convict. *Id.* Consequently, because post-conviction review of appellant's Rule 6(e) claims would be available, the appeal was dismissed as premature.

A slightly different perspective is found in *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986). In *Taylor*, the defendants had moved for dismissal of the indictment because the prosecution had "inva[ded] the defense camp," had failed to present exculpatory evidence to the grand jury, had biased the grand jury with "inadmissible, inflammatory, and prejudicial evidence," and had improperly used state officers in the grand jury investigation. *Id.* at 1338. The district court denied the motion and defendants sought an interlocutory appeal. *Id.* at 1338-39. The court of appeals dismissed, holding that the grand jury abuses could effectively be reviewed after final judgment. *Id.* at 1340.

Post-conviction review was available, in the Tenth Circuit's view, because unlike the "technical" violation found in *Mechanik*, the allegations raised by the *Taylor* defendants attacked the "fundamental fairness" of the criminal proceedings. A determination of guilt by the petit jury would not "moot" these issues, because they go be-

yond the question of whether the grand jury had sufficient evidence upon which to return an indictment. Because these claims would be justiciable following conviction, an interlocutory appeal was not warranted. *Id.* at 1340.

Similarly, in *United States v. LaRouche Campaign*, 829 F.2d 250 (1st Cir. 1987), the defendants claimed that the government had engaged in a "persistent and pervasive pattern" of grand jury abuse, including violations of Rule 6(e). *Id.* at 251. The district court denied defendants' motion to dismiss the indictment and an immediate appeal followed.

The defendants urged the court of appeals to review pre-trial their claims of grand jury abuse, arguing that the fifth amendment guaranteed to them a right to be tried only upon charges brought by an unbiased, informed grand jury. Unless an interlocutory appeal were allowed, argued the defendants, *Mechanik* insured that that right would be irrevocably lost.

The court quickly rejected defendants' suggestion of a general "right not to be *tried*" guaranteed by the fifth amendment. *Id.* at 252 (emphasis in original). The court further concluded that *Mechanik* did not require a departure from the general rule that flawed grand jury proceedings may effectively be reviewed and remedied following conviction. *Id.* at 254.

Similar to the view taken by the Tenth Circuit in *Taylor*, the court narrowly read *Mechanik* so as not to encompass the type of grand jury abuse alleged by the defendants. Claimed violations of Rule 6(e)'s secrecy provisions, the presentation of misleading hearsay evidence, and the government's trying of its case in the press, were all viewed by the court to be significantly different from the "somewhat technical violation" found in *Mechanik*. *Id.* at 253. Consequently, the court was

unconvinced that review of these alleged abuses would be foreclosed on appeal following conviction.

Moreover, the court concluded that even if *Mechanik*'s harmless error analysis were to be broadly applied to encompass such abuses, an interlocutory appeal would nevertheless be unwarranted. Stressing that the collateral order doctrine only permits appeals from orders that "'finally determine claims of right . . . *too important* to be denied review . . .,'" *id.* at 254 (quoting *Cohen*, 337 U.S. at 546) (emphasis in original), the court concluded that "it would be the rare alleged abuse of the grand jury process which, while not important enough to warrant relief on direct appeal from a judgment of conviction, would be important enough to warrant the extraordinary step of an interlocutory appeal in a criminal case." *Id.* In short, if the claimed defect in the grand jury proceeding is "not significant enough to warrant relief after conviction, [it is doubtful] that the alleged right invaded by the defect is 'important' enough . . . to call for an interlocutory appeal." *Id.* (citations omitted).

This view has recently been endorsed by the Seventh Circuit. In dismissing an appeal from the denial of a motion to withdraw pleas of guilty to charges contained in an indictment returned by a grand jury allegedly sitting beyond its term, the court rejected the defendants' *Mechanik* claim in part because

> to the extent *Mechanik* bars review of grand jury questions on appeal from the final judgment, it does so because any errors are too insignificant to call for correction. If the errors are too insignificant after conviction, they are too insignificant before conviction.

United States v. Daniels, 848 F.2d 758, 760 (7th Cir. 1988).

We agree with the view expressed by the First Circuit in *LaRouche* and the Seventh Circuit in *Daniels*. Even

if we assume that *Mechanik* would foreclose post-judgment review of the claims raised here, an interlocutory appeal would nevertheless not be justified. The collateral order doctrine permits appeals from orders that "finally determine claims of right separable from and collateral to, rights asserted in the action *too important* to be denied review. . . ." *Cohen*, 337 U.S. at 546 (emphasis added). Thus, if this court, on appeal following entry of a judgment of conviction, declines to review the claims of error asserted here, it will be because the court will have concluded that the asserted error resulted in no unfair prejudice to appellants and, as a consequence, was harmless beyond a reasonable doubt. If the claimed error will not be important enough to warrant correction on appeal from final judgment, it most assuredly is not important enough to warrant the extraordinary step of an interlocutory appeal. *LaRouche Campaign*, 829 F.2d at 254; *Daniels*, 848 F.2d at 760.

Based upon the foregoing, we conclude that we are without jurisdiction to entertain these consolidated appeals. 28 U.S.C. § 1291.[5] Accordingly, the motion of the United States is granted, and the appeals are dismissed.

II

In anticipation of our conclusion that their appeals are premature, appellants also seek extraordinary relief by way of mandamus. Claiming that the "pervasive dissemination" of their immunized testimony and the district court's "unprecedented and clearly erroneous" rulings "guarantee[]" constitutional error at their impending trials, appellants ask us to: (1) order the district court to dismiss the indictment as a matter of law; or (2)

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[5] In light of the unsettled caselaw from other circuits, we do not fault counsel for pursuing these protective appeals. We simply hold that appellate review must await termination of the proceedings by final judgment.

direct the district court to conduct additional pre-trial hearings regarding the use of their immunized testimony.

The remedy of mandamus "is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). The writ, which may be granted or withheld in the court's discretion, *Ex parte Republic of Peru*, 318 U.S. 578, 584 (1943), will be denied where another adequate remedy is available, *id.*, or where its issuance would "thwart the congressional policy against piecemeal appeals." *Parr v. United States*, 351 U.S. 513, 520-21 (1956). A petitioner seeking a writ of mandamus must therefore demonstrate that "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

As we noted in dismissing the appeals as premature, any claims of unfair prejudice arising out of alleged grand jury error will be reviewable on direct appeal following conviction. *Supra* at 10-11. Appellants thus have failed to demonstrate how the remedy afforded by direct appeal will be "clearly inadequate" to correct the perceived wrong. If appellants are correct in their assertion of unfairly prejudicial error, and those errors are properly preserved for appeal, vacation of the judgment of conviction and dismissal of the indictment will provide a full and fair remedy to appellants.

Moreover, appellants' claims of abuse of discretion by the district court with regard to the proposed use of immunized testimony at trial does not warrant mandamus relief. In *United States v. De Diego*, 511 F.2d 818, 823-24 (D.C. Cir. 1975), we held that:

> [a] trial court faced with a pretrial motion to dismiss the indictment because of immunity granted by Federal or State Governments has basically four alternative procedures for determining whether or not the prosecution's evidence is tainted: (1) it can hold a pre-trial evidentiary hearing; (2) it can hold a

> taint hearing during the trial as the questioned evidence is offered; (3) it can hold a post-trial hearing to determine taint; or (4) it can use a combination of these alternatives.

Clearly, this procedure vests in the district court a considerable degree of discretion to fashion the procedure most conducive to resolving fully and fairly all issues regarding the use of immunized testimony at trial. Pursuant to our holding in *De Diego*, there remains a considerable degree of latitude in the district court, both during and after trial, to correct any perceived errors. Any errors that remain, if properly preserved, may become the subject of review on direct appeal.

Accordingly, because there exists a clearly adequate remedy on direct appeal from any judgment of conviction, and to grant mandamus relief would thwart the congressional policy against piecemeal appeals, the petition for a writ of mandamus is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 88-0080

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER, OLIVER L. NORTH,
RICHARD V. SECORD, ALBERT HAKIM

PRETRIAL ORDER

Re: Preliminary Kastigar Hearing

At a pretrial conference held in open court on April 12, 1988, the Court considered with counsel for all parties the appropriate scope of a preliminary hearing directed to certain limited *Kastigar* issues which the Court indicated it believed should be considered at the outset of this case, to wit:

(1) Whether or not the Independent Counsel has taken appropriate administrative steps to ensure that members of his staff responsible for trial preparation and prosecution have been properly isolated from exposure to immunized testimony.

(2) Whether or not grand jury proceedings subsequent to the first grant of immunity to a defendant reflect impermissible evidentiary use of immunized testimony by the prosecution.

(3) Whether or not any of the witnesses the Independent Counsel now contemplates calling at trial who were not already known to the Independent Counsel prior to

the first grant of immunity to a defendant have been uncovered by leads obtained either directly or indirectly from immunized testimony.

With respect to item (1) above, a hearing has been set for 9:30 a.m. on April 25, 1988, at which time the Independent Counsel, Mr. Walsh, will disclose the administrative steps taken by his office to prevent impermissible exposure of his staff to defendants' immunized testimony. Any supporting documents to be relied on by Mr. Walsh in this limited respect shall be furnished to defense counsel by 5:00 p.m. on Thursday, April 21, 1988. It is contemplated that the defense will examine Mr. Walsh on this issue and inquire into a speech given by Mr. Walsh relating to the immunity issue. In addition, he or one of his assistants shall be prepared for questioning concerning an individual grand jury witness to be designated by defendants by Thursday, April 21, 1988. If defendants contemplate calling any witnesses at the April 25 hearing, they shall designate such witnesses by filing a brief offer of proof as to each witness' testimony on or before Thursday, April 21, 1988.

With respect to item (2) above, by April 25, 1988 the Independent Counsel shall furnish to the Court for its *in camera* inspection grand jury minutes of all grand jury sessions subsequent to the first grant of immunity to a defendant.

With respect to item (3) above, by April 25, 1988 the Independent Counsel shall provide counsel for the defendants and the Court with a list of all witnesses it presently contemplates calling as witnesses at the trial, indicating by an asterisk those witnesses already known to the Independent Counsel prior to the first grant of immunity to a defendant, as demonstrated by the presently segregated "canned" material. As to witnesses not so designated, the Independent Counsel shall briefly indicate in written summary form the factual basis, wholly

independent from any immunized testimony, which led the Independent Counsel to the witness.

The Court for purposes of this hearing *only* will proceed on the assumption that all immunized testimony was compelled and has not been waived. The Independent Counsel's right to challenge this assumption is fully preserved and may be raised during further proceedings, if necessary.

Awaiting the conclusion of the trial when a final *Kastigar* hearing will be held and making no final determination as to these issues, the Court rules that at this preliminary stage there shall be: no questioning of the grand jurors; no broad investigation into the Independent Counsel's tactics, investigating techniques, staffing, work product, etc.; no investigation into the thought processes or accuracy of statements of proposed witnesses; and no investigation of families, friends and social acquaintances of either attorneys on the Independent Counsel's staff, or those of witnesses, grand jurors or classification experts—all as requested by defendants but hereby preliminarily denied by the Court.

SO ORDERED.

/s/ Gerhard A. Gesell
United States District Judge

April 13, 1988.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 88-0080

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER, OLIVER L. NORTH,
RICHARD V. SECORD, ALBERT HAKIM

MEMORANDUM OPINION AND ORDER

[Filed June 16, 1988]

Introduction

The indictment in this criminal case was returned by the grand jury on March 16, 1988, after months of thorough investigation. Defendants Poindexter, North and Hakim have jointly moved to dismiss, claiming that their separate Fifth Amendment rights have been infringed by impermissible use of their compelled testimony. The motion was fully briefed and argued.

At the core of the indictment is the claim that the defendants formed and carried out a secret operation to place funds, including funds generated from an authorized government initiative to free American hostages into unauthorized hands for their personal profit, by deceiving Congress, obstructing investigations, altering documents, abusing the tax laws, and by other means prohibited by law. These activities were allegedly conducted from the White House by the two government officials and two businessmen indicted.

These charges of criminal conduct were preceded by a series of widely publicized congressional committee hearings. Each of the four men subsequently named defendants testified at length concerning his involvement in events later recited in the 101-page, 23-count indictment. After pleading the Fifth Amendment, the three moving defendants were compelled by Congress to testify under separate orders granting each of them use immunity. They claim their immune testimony, both incriminating and otherwise, was thereafter used, directly and indirectly, to gain proof of their alleged criminal misconduct, thus violating their individual Fifth Amendment rights.

Since it was apparent that many trial days would be consumed if the indictment was fully tried, the Court has given extensive pretrial consideration to many aspects of this motion in order to determine, at last preliminarily, whether or not defendants' contentions have sufficient merit to preclude trial from the outset. For the reasons set forth below, the Court, after hearing testimony and considering other materials during this substantial preliminary inquiry, finds no basis for granting the motion pre-trial and has determined in its discretion and in accordance with procedures approved in this Circuit[1] that

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[1] In *United States v. De Diego*, 511 F.2d 818, 823-24 (D.C. Cir. 1975), this Circuit established the following procedural rule:

> A trial court faced with a pretrial motion to dismiss the indictment because of immunity granted by Federal or State Governments has basically four alternative procedures for determining whether or not the prosecution's evidence is tainted: (1) it can hold a pretrial evidentiary hearing; (2) it can hold a taint hearing during the trial as the questioned evidence is offered; (3) it can hold a post-trial hearing to determine taint; or (4) it can use a combination of these alternatives. In exercising its options where, as here, there are other defendants named in the indictment, the trial judge may order a severance so that the question of taint can be limited to the trial of the defendant claiming immunity.

any final consideration of the issues must be deferred until after a full trial.

A.

Background

This case has its origin in an intense political controversy over the appropriate foreign policy for dealing with violent unrest in Nicaragua, which some considered a threat to national security. The President and the Congress had for some time been at odds over this and related issues affecting Central America, with the latter seeking to limit the former's zeal for more strenuous military and economic involvement.

In November, 1986, Congress undertook to investigate when it came to believe that the administration was trafficking arms to Iran to bring about release of American hostages and that the proceeds had been diverted to the Nicaraguan contras for military assistance at a time when Congress had legislated to bar such aid to these resistance forces. Select Investigation Committees were eventually chosen from each house. These Committees merged their efforts, sharing information during some 40 days of public hearings, supplemented by closed executive sessions in what came to be known as the Iran-Contra Affair.[2] Public hearings commenced May 5, 1987. The activities of North and his associates became the focus of the Committee hearings.

Previously, on December 1, 1986, the President appointed a Special Review Board (the "Tower Commis-

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[2] These investigations were conducted by the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House of Representatives Select Committee to Investigate Covert Arms Transactions with Iran. *See Report of the Congressional Committees Investigating the Iran-Contra Affair*, H.R. Rep. No. 100-433, S. Rep. No. 100-216, 100th Cong., 1st Sess. (Ordered printed November 17, 1987).

sion") to conduct an investigation of the same disclosures and on December 4, 1986, Attorney General Meese requested appointment of an Independent Counsel pursuant to 28 U.S.C. § 592(d)(2) to investigate the possible criminal conduct of Lt. Col. Oliver L. North, a White House aide, and others unnamed. Lawrence E. Walsh, a former federal judge, was appointed Independent Counsel and given broad authority to investigate by Order of the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit on December 19, 1986.[3] A grand jury was then empaneled to assist his investigation on January 28, 1987, and proceedings commenced.

After May 1, 1987, as the two inquiries went forward simultaneously there was a growing fire storm of publicity that brought practically every aspect of defendants' affairs into sharp focus. The moving defendants were vigorously attacked and vigorously defended in the midst of ardent political debate that accompanied the unravelling public disclosure by congressional committees.

Congress purported to pursue its legitimate legislative interest in the Iran-contra affair but did so in such a persistent manner that it sought, among other things, to fix individual responsibility for conduct it considered unauthorized by law. When Hakim, North and Poindexter, a former Admiral, individually refused to testify before Congress and claimed possible incrimination by asserting their Fifth Amendment rights, they were each, in turn, granted use immunity pursuant to 18 U.S.C.

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[3] Mr. Walsh received a dual appointment from the Attorney General on March 5, 1987. *See* 52 Fed. Reg. 7270 (March 10, 1987), 9241 (March 23, 1987). Defendants have challenged the validity of Independent Counsel's initial designation and the legality of grand jury proceedings conducted by him. This issue has been deferred pending action by the United States Supreme Court in *Morrison v. Olson*, U.S. Sup. Ct. No. 87-1279, argued April 26, 1988.

§ 6001 *et seq.* Their subsequent testimony in each instance was compelled.

The use immunity orders Congress sought and obtained were dated as follows: [4]

Hakim	—	April 10, 1987
Poindexter	—	May 1, 1987
North	—	June 3, 1987

Hakim gave his first public testimony before the Select Committees on June 3, 1987; North followed, commencing his testimony on July 7, 1987; and Poindexter first testified publicly on July 15, 1987.

Hakim is named a defendant in five counts of the indictment, Poindexter in seven counts, and North in sixteen counts. All three immunized defendants are named along with Secord, who testified without immunity, in Counts I, II and III of the indictment, which set forth the overall conspiracy, theft and fraud counts.

The congressional power of inquiry is very broad. Congress may compel witnesses to testify over their assertion of Fifth Amendment rights to remain silent for fear of incrimination by granting some form of immunity, as was done here, and it may cause a recalcitrant witness to be punished for contempt if this fails. Few formal procedures or evidentiary rules apply during this process.

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[4] Provisions of the immunity statute are keyed to the particular proceeding in which immunity is conferred: court or grand jury, formal administrative or congressional. *See* §§ 6003-6005. Although Section 6005 requires that Congress serve the Attorney General with notice of its intention to immunize a witness, it is solely within Congress' discretion to seek an immunity order and the court's role in granting such an order is purely procedural. Thus, there always exists the real possibility that Congress' discretionary decision that immunizing a witness will best serve the public interest may interfere with the law enforcement activities of the Executive Branch, raising the very issues presented by the instant motions.

This power to compel testimony in aid of legislative inquiry was assumed to exist by American legislatures even before the Constitution itself was ratified, both Houses of Congress took the same view thereafter, and the Supreme Court has recognized the constitutionality of this authority as an appropriate auxiliary function of Congress, sustaining this enormous nonjudicial power in spite of the obvious possibility of abuse.[5] In *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927), the Supreme Court, in upholding the investigatory authority of Congress, noted:

> The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing.

Thus there is no doubt that Congress can perform its legislative functions through inquiry without regard for the impact its investigation may have upon a prospective or ongoing criminal prosecution.

However, in this instance, Congress was aware of the conflict and efforts were made to reconcile the special interests of both Congress and the Executive. Although Congress felt it needed the immunized testimony, Congress made it abundantly clear that it did not intend to prevent the prosecution of North and other major targets of the grand jury inquiry. Before any major participant was immunized, its own legal staff analyzed the evidence already developed before the congressional committees and by the Tower Commission to demonstrate to the Select Committees that ample proof of the principal

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[5] Congress may not, of course, use its investigating power merely to call conduct it does not like to the attention of the public, that is, "expose for the sake of exposure" alone. Nothing of this sort is suggested here.

crimes subsequently alleged in the indictment already existed and necessary proof was already known from the witnesses and documents available. In addition, the Select Committees gave Independent Counsel ample warning that grants of immunity were contemplated, delaying any public immunized testimony by the defendants even after orders granting immunity had issued. In granting immunity to each of the three defendants, Congress had no intention to stultify the Executive's enforcement of criminal law. Indeed, it was fully expected prosecutions would go forward since ample proof of wrongdoing apparently existed.[6]

As this brief background statement suggests, both Congress and the Executive have pursued their separate responsibilities and the Court is now called on to fulfill the role assigned the judiciary under our system of government to assure that the defendants' Fifth Amendment constitutional rights have not been infringed as a result of the actions of the legislative and executive branches.

B.

The Immunity Statute

As previously noted, under 18 U.S.C. § 6001 *et seq.* Congress can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against self-incrimination by conferring immunity from use of the compelled testimony and evidence derived therefrom in subsequent criminal prosecutions.

Section 6002 of the immunity statute reads in full as follows:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or

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[6] This is not the first instance where indictment followed a grant of immunity by Congress during a public investigation. *See United States v. Romano*, 583 F.2d 1 (1st Cir. 1978).

provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either a House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but *no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case*, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Emphasis added).

This statute was not intended to prohibit a grand jury from indicting or a prosecutor from trying a person granted use immunity. It only limits direct use of the testimony itself and derivative use.

According to the House and Senate Reports, the phrase "any information directly or indirectly derived from such testimony" was chosen to conform to "present law" on "the use of evidence derivatively obtained." The Reports cite *Wong Sun v. United States*, 371 U.S. 471 (1963), the seminal case on what is known as the "fruits" doctrine, as representing "present law." See S. Rep. No. 91617, at 145; H.R. Rep. No. 91-1188, at 12; H.R. Rep. No. 91-1549, at 42. Thus, "as legislative history demonstrates, Congress intended to incorporate the 'fruits' doctrine into the statute by use of the phrase 'directly or

indirectly.'" *Pillsbury Co. v. Conboy*, 459 U.S. 248, 277-78 (1983) (Blackmun, J., concurring in judgment).

In short, the section was intended to safeguard an unwilling witness compelled to testify as broadly as, but no more broadly than, the privilege against self-incrimination. *United States v. Apfelbaum*, 445 U.S. 115, 123 (1980). Relying on their reading of Supreme Court interpretations of the Fifth Amendment, the statute's framers believed that immunity from the use of compelled testimony and evidence derived therefrom ("use and derivative use" immunity) was coextensive with the Fifth Amendment privilege against self-incrimination and based the statute upon that standard.[7]

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[7] The current federal statute was enacted in 1970. It superseded a multitude of federal statutes which barred prosecution of a witness compelled to testify on any matter logically related to the transaction which was the subject of the compelled testimony. Under these "transactional" immunity statutes, a rule was set up which barred prosecution of a compelled witness, even on independent evidence, so long as the prosecution was related to the immunized transaction. By contrast, the current statute substituted a "use restriction" rule and the word "immunity" in the new statute took on the meaning of "immunity" from having one's testimony or its fruits used against him in a criminal case. *See* 2 Working Papers of the National Commission on Reform of Federal Criminal Laws 1406 (1970).

One justification for this change was the contradictory treatments of immunized testimony and illegally coerced confessions; the latter results in the suppression of the confession and its fruits rather than the dismissal of the charge. The National Commission on Reform of Federal Criminal Laws, whose recommendation served as the model for the current statute, made the following comment on its proposed changes:

> We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel,

The Supreme Court in *Kastigar v. United States*, 406 U.S. 441 (1972), sustained the constitutionality of the use immunity statute, holding that the scope of "use and derivative use" immunity was indeed "coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination." *Id.* at 448, 453. In *Kastigar*, the Court relied heavily on the logic and language of *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). Justice Harlan, concurring in *Murphy*, succinctly stated the rule set out in that case, commenting that a state grant of immunity prohibits the use in a federal prosecution "*of state-compelled incriminating evidence or the 'fruits' directly attributable thereto.*" *Id.* at 91, n.7. This "exclusionary rule," the Court stated, "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." *Id.* at 79.

Kastigar, in reaffirming this "exclusionary rule" concept, emphasized the "heavy burden" of proof it places on the United States by stating:

> "Once a defendant demonstrates that he has testified, under a . . . grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that they had an independent, legitimate source for the disputed evidence." This burden of proof, which we reaffirm as appropriate, is not limited to the negation of taint; rather it imposes on the prosecution the affirmative duty to prove that the *evidence* it proposes to use is derived from a legitimate source wholly independent

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and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers.

Id. at 1446, quoted in *Kastigar v. United States*, 406 U.S. 441, 452 n.36 (1972).

> of the compelled testimony." *Id.* at 460 (Citations omitted) (Emphasis added).

See also Murphy, 378 U.S. at 79 n.18; *Pillsbury Co. v. Conboy*, 459 U.S. 248, 249-255 (1983).

Accordingly, where a defendant under indictment has earlier received use immunity the prosecutor is prohibited from using not only the immunized testimony itself, but also any information which is the fruit of the immunized testimony; and the prosecutor bears the "heavy burden" of demonstrating that all its evidence at trial is derived from legitimate sources wholly independent of the compelled testimony; that is, the prosecution must not have been "led", directly or indirectly, to the discovery of evidence through the immunized testimony.

The Court in *Kastigar* did not expressly decide whether nonevidentiary use is prohibited to the same degree as evidentiary use. *See* 406 U.S. at 453-54, 459-60. It should be emphasized, however, that the rule originally set down in *Murphy* is an exclusionary rule focusing on the exclusion of tained *evidence* from use by the prosecution, or as the Court in *Kastigar* held, the government need only prove that it obtained "the *evidence* it proposes to use" from independent sources. 406 U.S. at 460 (Emphasis added.)

Significantly, while the Court did note that the petitioners in *Kastigar* had raised arguments relating to "the subtle ways in which the compelled testimony may disadvantage a witness" (*id.* at 459), it did not impose the same affirmative burden on the prosecution to prove an absence of nonevidentiary use. *See id.* at 460. Instead, the Court responded to the nonevidentiary claims only by adding that the statute "barr[ed] the use of compelled testimony as an 'investigatory lead,' and also barr[ed] the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Id.* at 460 (Citations omitted). Moreover,

the Court recognized that the use immunity the statute provides is "analogous to the Fifth Amendment requirement in cases of coerced confessions." *Id.* at 461. When an incriminating statement has been obtained through coercion, the Fifth Amendment prohibits use of the statement or its "fruits"; thus "the 'fruits' doctrine provides all the protection the Constitution requires." *Pillsbury Co. v. Conboy*, 459 U.S. 248, n.9 (1983) (Blackmun, J., concurring in judgment). However, it should not be underemphasized that—although the analogy to coerced confession cases is appropriate—the prosecution in a use immunity case carries the far heavier burden of affirmatively proving not only a negation of taint but that *all* its *evidence* is "derived from legitimate sources wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460.

The defendants, however, take a far broader view of use immunity strictures. The concept of evidentiary use, it is suggested, should apply in the use immunity context to any use of immunized testimony to refresh the memory of a prospective witness and even the more subtle effects which full or even limited knowledge of the testimony can have on how a witness or a prosecutor exposed to it perceives an event. There is no authority for applying such an expanded view, except under very unusual circumstances not present here,[8] and there is far stronger authority to the contrary.[9] These and other cases implementing the *Kastigar* doctrine are, in any event, fact oriented and depend on whether the factual

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[8] Unlike this case, in *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), the prosecutor read the immunized testimony—unaware that it was immunized—and it caused him to initiate the prosecution and affected the planning of his trial strategy. *See also United States v. Barker*, 542 F.2d 479, 484 n.9 (8th Cir. 1976); *United States v. Bianco*, 534 F.2d 501, 511 n.14 (2nd Cir. 1976).

[9] *See United States v. Crowson*, 828 F.2d 1427 (9th Cir. 1987); *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985).

circumstances will preclude the prosecutor from meeting his heavy burden of proof. On the outer limits of evidentiary use such as those defendants urge, where the borderline between evidentiary and nonevidentiary is obviously indistinct, the nature of a witness' exposure to immunized testimony and the manner in which the knowledge was applied become significant. Knowledge does not constitute impermissible taint in the same sense that taint from the use of the knowledge may defeat prosecution when it constitutes direct or derivative use leading to evidence that would not otherwise have been found or stimulates the prosecution itself.[10]

C.

The Court's Preliminary Considerations

The Court's preliminary pretrial inquiry has not been superficial. The Court has personally reviewed, *in camera*, the grand jury transcripts and exhibits at length; various precautions taken by Independent Counsel to avoid taint from exposure of the prosecution to publicity and immunized testimony were explored during his two days of public testimony; extensive exhibits illustrating the manner in which these precautions were implemented were filed, some publicly, others *in camera*; and substantial proof of Independent Counsel's legitimate independent leads to every significant witness were carefully documented, again *in camera*.

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[10] The semantic difficulties of using the words "taint" or "tainted" are often reflected in the briefs and arguments. In *In re Sealed Case*, 832 F.2d 1268, 1281 (D.C. Cir. 1987), the Court referred to tainted testimony known to Independent Counsel. Defendants cite the case for the proposition that Independent Counsel "relied on" immunized testimony to learn a fact. (Reply Memorandum in Support of Motion of Defendant Oliver L. North for Severance, pp. 20-21.) While Independent Counsel could not use that knowledge or any information derived from it, his proof that he knew the same thing from other independent sources prior to the testimony would still enable him to prove the fact in spite of later tainted knowledge.

The Office of Independent Counsel interviewed Secord on eleven occasions: April 29, 1987; April 30, 1987; May 13, 1987; May 14, 1987; May 20, 1987; December 11, 1987; January 22, 1988; January 25, 1988; February 26, 1988; March 9, 1988; and March 12, 1988. This was pursuant to an arrangement approved by his counsel that Secord's statements could not be used as testimony in a case-in-chief against him but could be used for purposes of cross-examination or in a direct case for perjury or false statements. Secord was instructed not to refer either directly or indirectly to any statements made under the grants of immunity to Hakim, North or Poindexter. During interviews totalling nearly 1,400 pages of transcript, Secord went into extraordinarily comprehensive detail about his knowledge of and involvement in almost every aspect of the Iran-contra matter, providing the prosecution with valuable leads and other background information for its case. Nearly 950 pages of transcript cover interviews occurring before either North or Poindexter were compelled to testify publicly.[11]

As will be developed later, Independent Counsel from the outset undertook to enforce a prophylactic system whereby various procedures prevented him or his associates directly involved in the prosecution from being exposed, directly or indirectly, to the immunized testimony, an approach recommended in the U.S. Attorney's Manual.

The Court turns first to the grand jury transcript which it has thoroughly examined with the aid of other supplemental information provided by Independent Counsel. It will be recalled, as previously stated, that Hakim did not testify publicly until June 3, 1987. Between April 10, 1987, when the use immunity order issued, and

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[11] A fuller description of evidentiary material considered by the Court in reaching these preliminary determinations appears in the Appendix.

June 2, 1987, the grand jury heard many witnesses. Some of these witnesses testified to matters involved in another investigation, others included a few key prosecution witnesses who had been identified well before Hakim's testimony. Still other witnesses were questioned concerning materials previously subpoenaed or about matters unrelated to Hakim's testimony.

In the period between June 3, 1987, and June 29, 1987, when the grand jury discontinued taking testimony until the fall, it heard a variety of witnesses. Again the key witnesses were well known, a considerable number testified on matters wholly unrelated to any activity of Hakim, and independent leads had exposed others. The grand jury was reconvened to take testimony on September 2, 1987.[12] However, neither North nor Poindexter testified publicly before the Select Committees until North's testimony on June 7, 1987, and their testimony was completed by July 21, 1987, while the grand jury was still in recess.

After the grand jury commenced further hearings in September, 1987, 89 witnesses were heard. Many of these witnesses had previously appeared or were simply more routine witnesses associated with document identification and other formal steps preparatory to indictment.

No immunized testimony of any defendant was ever presented to the grand jury at any time in whole or in part.

In reviewing the grand jury transcripts the Court focused primarily on the following:

(1) The nature and extent of the instructions given the grand jurors designed to prevent exposure to defendants' immunized testimony.

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[12] Some members of the grand jury did meet in the grand jury room on occasion between June 29 and September 2, 1987, to review exhibits and prior testimony.

(2) Any departure from these instructions suggested by questions or comments of counsel or jurors.

(3) Safeguards and techniques adopted by Independent Counsel to prevent inadvertent or derivative exposure of immune testimony by witnesses appearing before the grand jury.

The grand jurors were specifically, repeatedly and effectively instructed to avoid exposure to any immunized testimony. A sample of these warnings is already in the public record. (Court Ex. D, *Kastigar* hearing held April 25, 1988.) Many more warnings were given during the course of the grand jury's tenure.

The thrust of these warnings is illustrated by the examples set out below.

On April 10, 1987, when the grant of use immunity to Hakim became effective, but well before he testified, the grand jurors were instructed to cease reading or listening to any news reports concerning him. The instruction was as follows:

> As you may have heard, the Congressional committees investigating this matter have given "use immunity" to certain individuals in return for their testimony. The grant of use immunity to Albert Hakim becomes effective today. We want to give you some explanation about what that means for your investigation.
>
> When a person receives "use immunity" that does not mean that this individual may never be indicted or prosecuted for the criminal activities he may disclose while giving immunized testimony. It does mean that neither the Office of Independent Counsel nor you—the Grand Jury—may use, directly or indirectly, the testimony given under immunity in deciding whether to indict these individuals. In other words, if we present for your consideration a pro-

posed indictment against Albert Hakim, your decision whether or not to indict cannot be based in any way on his immunized testimony before Congress or any evidence derived from it.

Because immunized testimony from Mr. Hakim, or information derived from his immunized testimony, may soon become public as a result of the Congressional grant of immunity to him, we believe you, the members of the grand jury, must take certain precautions. I am therefore instructing you that as a legal matter that, until further notice, you should not read any newspaper or magazine articles, watch any television programs or listen to any radio reports that mention Albert Hakim. If you are reading something that makes reference to Mr. Hakim, as soon as you realize that he is being referred to, please stop reading it. If you are watching a program or listening to the radio and Mr. Hakim is mentioned, please switch the show off. In any event, you will be required to base any decision as to whether or not to indict an individual such as Mr. Hakim on the testimony and exhibits which you have reviewed and heard in the grand jury. However, by taking the precautions which I have described, we can all be sure that your decision whether or not to indict an individual such as Mr. Hakim will be based solely on non-immunized evidence.

Although Mr. Hakim's grant of immunity becomes effective today, it is anticipated that he may not be . . . giving immunized testimony in Congress immediately. However, at a later date, we may receive word that Mr. Hakim will give immunized testimony which may be public and which may receive widespread publicity during the days that he is giving that testimony. If we become aware of such an event, we will advise you of it.

> Now Mr. Hakim's immunity, as I said, becomes effective today. Further grants of immunity by Congress will become effective on future dates and we will promptly advise the grand jury as those become effective so that you may take the same precautions.
>
> You should regard your obligation to avoid contact with immunized testimony as part of your duties as a grand juror, and you should take it as seriously as you have all of your other obligations as a grand juror. . . .
>
> Before leaving this subject, I must further instruct you with emphasis that you should draw no inference whatsoever with respect to Mr. Hakim from the fact that Mr. Hakim has received a Congressional grant of immunity. Such grants of immunity do not necessarily mean or suggest that the person immunized has committed crimes or done anything unlawful. Therefore, I instruct you that you are not to consider the fact that Mr. Hakim has received such a grant of immunity as being pertinent to your investigation and, again, you are to draw no inferences for, against or with respect to Mr. Hakim based on the fact that he has received such immunity from Congress.

Transcript of April 10, 1987 at 3-7.

These instructions were modified and expanded during the spring and summer of 1987. With the impending public immunized testimony of Hakim before the congressional committees, the grand jurors were warned on May 15, 1987 that they should avoid any media reports that "relate[] to the Iran/contra matter in any way." Transcript of May 15, 1987 at 3. They were also advised at that time, "if you are watching a television program, or listening to the radio, or any report comes on about the Iran/contra investigation or Iran/contra matter, turn

the program off." *Id.* This instruction was copied and made into grand jury exhibit number 353 and served as a continuing reminder as grand jurors reviewed exhibits from time to time. These instructions were repeated numerous times, warning grand jurors not to expose themselves to any media reports concerning the Iran/contra affair.

When the immunized testimony of North and Poindexter became imminent, further instructions were given. Independent Counsel Walsh stated to the grand jury on July 1, 1987:

> [Y]ou must, at really great expense and great inconvenience, avoid learning what Colonel North said. . . . I am asking you to impose on yourself the instructions you have imposed on yourselves ever since Mr. Hakim testified, but I want to reassert its importance now of avoiding reading anything about this investigation. There is nothing that is going to come out in public print that is as important as what is going to be presented to you and what has been presented to you.

Transcript of July 1, 1987 at 2-3. These instructions were repeated and marked as exhibits on July 6 and on July 13 when procedures for the jurors' review of grand jury transcripts and exhibits were again discussed.

Again on July 20, 1987, Associate Independent Counsel gave the following instruction to the grand jury:

> Before I open it up to questions and before I leave, let me just remind you that you are operating under an instruction under which you cannot read any articles relating to Iran/contra, nor pay attention to news accounts which focus on those stories.
>
> Our information is that Admiral Poindexter will be completing his testimony today, and that following Admiral Poindexter's testimony, Attorney General

> Meese, Secretary Weinberger, Secretary Schultz, and I believe a couple of other high ranking Administration officials will be testifying.
>
> Now, under normal circumstances there would be no need for you to avoid testimony, but, regrettable, is our firm conviction that many of the questions that are going to be asked by Congressmen and Senators are going to be based on the immunized testimony of Lieutenant Colonel North and Admiral Poindexter. Indeed, we believe that the bulk of the examination is going to be matters raised in the context of those pieces of immunized testimony.
>
> As a result, we must caution you still not to read any reports of the Iran/contra matter or listen to any news reports that cover those matters. It is a tremendous inconvenience. We understand that, but, as you know, we've been erring on the side of caution throughout, and we think the chances are simply too great that the questions will focus on matters raised by North and Poindexter to allow us to go ahead and listen to the testimony now.

Transcript of July 20, 1987 at 2-3. On September 2, 1987, when a grand juror indicated he had seen a headline concerning the constitutionality of the Independent Counsel statute, counsel reminded, "[W]e still are under a limitation where we should not and you should not be reading any articles on the Iran-contra matter." Transcript of September 2, 1987 at 5.

Finally, on March 16, 1988, immediately before the grand jury voted on the indictment submitted to them, Associate Independent Counsel gave the following instruction to the grand jurors:

> As you know, as you have heard many times, Albert Hakim, . . . , John Poindexter, and Oliver North all testified before the congressional commit-

> tees under grants of limited immunity. This means that their congressional testimony cannot be used against them by this grand jury or by our office.
>
> Now you have all been instructed repeatedly to avoid any exposure or reference to the immunized testimony of Hakim, . . ., Poindexter and North. Nevertheless, some of you may have been accidentally exposed to some of this immunized testimony. Whatever testimony of these individuals that you may have been exposed to should not be considered or used by you in any way in interpreting the evidence before you in the grand jury room or in determining whether or not to vote an indictment.

Transcript of March 16, 1988 at 2. Shortly after receiving this instruction, the grand jury voted unanimously to indict the four defendants in this case.[13] There was undoubtedly ample probable cause for each count. Considering the fact alone that the great bulk of the evidence was clearly known to Independent Counsel before any defendant received use immunity, there is strong indication that the decision to indict was in no respect tainted.

There is clear indication that the grand jurors understood the warnings and instructions they received. Jurors were warned frequently. Since, as will appear, many grand jury witnesses were specifically advised at the opening of their testimony before the grand jury to avoid testimony based on immunized testimony, the jurors were thus indirectly reminded of their concurrent need to avoid exposure.

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[13] Two replacement grand jurors were qualified, one in December, 1987 and one in January, 1988, after the immunized testimony had been taken before the Select Committees. Neither grand juror was questioned in any detail concerning any knowledge either might have of the content or nature of the immunized testimony. The records of the grand jury indicate that in the normal course of later events they were adequately warned.

While there was no system requiring grand jurors to report about the casual overhearing of a comment or the sighting of a headline while away from the grand jury room, there is no indication in the transcript this ever occurred. The grand jury was attentive. As the warning instructions continued to be given throughout the grand jury sessions, it is significant that by early May, 1987, the conscientious foreman, without prompting, politely pointed out that cautions were being given every session, that the jurors were intelligent, logical people and that Independent Counsel could be assured that the jury, using common sense and intelligence, was taking all appropriate steps to act according to his instructions.

Independent Counsel also took other precautions to avoid exposure of the grand jury to immunized testimony. Beginning in July, 1987, the lawyers and investigators began instructing potential witnesses during interviews not to repeat any of the immunized testimony they may have been exposed to. When the grand jury reconvened in September, grand jury witnesses were formally instructed on matters relating to immunized testimony. Immediately after each witness swore the oath, Associate Independent Counsel were directed to instruct witnesses as follows:

> Certain witnesses have testified under Congressional grants of limited immunity before House and Senate Committees investigating the Iran/Contra matter. These witnesses include Albert Hakim, Oliver North, John Poindexter and the former CIA station chief in Costa Rica. Our Office is avoiding exposure to the immunized testimony of these witnesses I have just named. Please make sure that your answers to our questions are based solely on your own personal knowledge and recollection of the events in question. Do not relate to us anything which you learned for the first time as a result of

listening to or reading or hearing about immunized testimony.

This formal instruction was usually given immediately prior to the witness testifying before the grand jury. In addition, a limited number of cooperating witnesses agreed to avoid exposing themselves to any of the immunized testimony elicited by Congress.

Associate Independent Counsel appearing before the grand jury were apparently careful to avoid broad, rambling questions that might inadvertently invite generalized answers that comprehended facts not personally known to the witness but learned from immunized testimony. The questioning was precise and called for explicit, narrow responses. The practice was also generally followed of excusing a witness before a grand juror presented his or her own questions to make sure the inquiries were expressed so as to avoid inadvertent disclosure by the witness of immunized testimony.

Finally, it should be noted that the grand jury, in denying Secord's request to appear before them and present portions of the immunized testimony of his co-defendants, displayed a clear understanding of the potential consequences of their exposure to immunized testimony and a tenacious desire to avoid such exposure. The transcript reveals that the jurors clearly understood that they must avoid knowledge of immunized testimony, that they would be unable to tell whether or not General Secord was relying on immunized testimony if he could proceed before the jury without guided, precise questioning, and that the foreman had previously advised Associate Independent Counsel in a similar situation that the jury would walk out of the room if immunized testimony was presented. Transcript of January 11, 1988 at 9-13.

In considering the foregoing, it must be emphasized that the immunized testimony taken before the Select Congressional Committees was elicited relatively late and

well after the apparent diversion of funds, various cover-up tactics and many other facts relevant and material to the charges in this indictment were known to Independent Counsel. Between January 28, 1987, and April 10, 1987, when the first order granting immunity to a defendant, Hakim, was entered, Independent Counsel issued numerous subpoenas duces tecum for voluminous records and had already presented substantial information to the grand jury. The revealing public report of the Tower Commission had issued and Independent Counsel had had access to interview memoranda, depositions and documents gathered by that inquiry from within the White House and elsewhere. In addition, proceedings before various congressional committees, the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, and the House Select Committee to Investigate Covert Arms Transactions with Iran, all relating to aspects of the matter under investigation, had already been held. These proceedings were extensive and informative. General Secord, former National Security Adviser Robert C. McFarlane, Secretary of State George P. Schultz, and Attorney General Edwin Meese III, for example, were among the congressional witnesses who had testified in public before defendant Hakim was compelled to talk.

Turning, then, from consideration of the grand jury to an examination of the possibility of exposure of the prosecuting attorneys and their immediate assistants to immunized testimony, there must be noted several administrative steps which were taken by Independent Counsel from an early date to prevent exposure of himself and his associate counsel to any immunized testimony. Prosecuting personnel were sealed off from exposure to the immunized testimony itself and publicity concerning it. Daily newspaper clippings and transcripts of testimony before the Select Committees were redacted by nonprose-

cuting "tainted" personnel to avoid direct and explicit references to immunized testimony. Prosecutors, and those immediately associated with them, were confined to reading these redacted materials. In addition, they were instructed to shut off television or radio broadcasts that even approached discussion of the immunized testimony. A conscientious effort to comply with these instructions was made and they were apparently quite successful. In order to monitor the matter, all inadvertent exposures were to be reported for review of their possible significance by an attorney, Douglass, who played no other role in the prosecution after the immunized testimony started. The Court has reviewed *in camera* a file maintained by Douglass which consists of his miscellaneous papers recording, often in cryptic terms, incidents where Mr. Walsh, an Associate Independent Counsel, paralegal or a senior staff member inadvertently were exposed. Usually this exposure was to headline or a bit of a broadcast bearing on the immunized testimony. Occasionally more formal memoranda of the same nature were sent to Douglass. His attention was also called to one or more instances where review of the redaction of press clippings suggested the need for further excision. Little, if any, of these papers has any special significance. In many instances it was apparent that Independent Counsel already had obtained through independent sources the information suggested by the inadvertent exposure. Often the information itself was so fragmentary that it lacked coherence or substance standing alone. In a very few situations the employee was detailed to wholly unrelated work at the employee's own suggestion or by Douglass.[14]

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[14] Defendants' motion for immediate access to the Douglass file is denied. The Court has read the file, which shall remain under seal. It would delay the trial, intrude into Independent Counsel's work product, and, moreover, rulings made herein as to the scope and effect of use immunity make disclosure wholly unnecessary, at least at this juncture.

Overall, the file reflects a scrupulous awareness of the strictures against exposure and a conscientious attempt to avoid even the most remote possibility of any impermissible taint. Douglass apparently operated on a common sense basis. He received reports orally and in writing. Each report was resolved individually in the light of its nature and the role of the reporting individual. Approximately seventy-five reports were processed by Douglass over the period from July, 1987 to April, 1988. Only two or three appear to have had any semblance of meaningful significance.

Finally, the Court has received written materials from Independent Counsel demonstrating that all the prosecutor's substantive witnesses were known to him before the first immunity grant.[15] FBI and other records filed *in camera* show that Independent Counsel was led to these witnesses by sources wholly independent of the immunized testimony given before the Select Committees. All documents obtained by or subpoenaed by Independent Counsel, as well as interviews and leads already obtained before April 10, 1987, have been separated and sealed to ensure a full record of his independent development of facts and witnesses should that be necessary in more detail at a further post-trial *Kastigar* hearing.

Some nonevidentiary problems have been emphasized by defendants. Witnesses, probably a considerable number of them, have had their memories refreshed by the immunized testimony. This has occurred from hearing the testimony, reading about it, being questioned about aspects of it before the Select Committees and, to some extent, by exposure to it in the course of responding to inquiries within their respective agencies. None of this

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[15] The legitimate discovery of these witnesses by leads wholly independent of the compelled testimony cannot be overemphasized as an indication of the weakness of the present motion. *See United States v. Rinaldi*, 808 F.2d 1579, 1583, 1584 (D.C. Cir. 1987); *United States v. Seiffert*, 501 F.2d 974, 982-83 (5th Cir. 1974).

apparently occurred because someone wanted to harm a defendant or help the prosecution; it simply occurred in the natural course of events. Memory is a mysterious thing that can be stirred by a shaggy dog or a broken promise. There is no way a trier of fact can determine whether the memories of these witnesses would be substantially different if it had not been stimulated by a bit of the immunized testimony itself. Thus, unless an independently discovered witness exposed to immunized testimony is barred by law from testifying against the compelled witness in a criminal prosecution, there is no way of determining, except possibly by a trial before the trial, whether or not any defendant was placed in a substantially worse position by the possible refreshment of a witness' memory through such exposure. No court has ever so required, nor did *Kastigar* suggest anything of the kind.[16] It gives this Court no concern, as a matter of law or fact. If testimony remains truthful the refreshment itself is not an evidentiary use.

Another related nonevidentiary problem concerns the significance of mere exposure to some or all of the testimony. Defendants in their zeal treat this as if even the tiniest exposure to a witness or grand juror constituted exposure to an incurable disease. Such is clearly not the case. Exposure to a fleeting snippet means nothing. It

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[16] Reference has already been made to the Supreme Court's refusal in *Kastigar* to heed petitioners' plea that subtle nonevidentiary uses of immunized testimony be considered and barred under the Fifth Amendment. It is significant here that petitioners pressed refreshed memory nonevidentiary use in their appeal brief before the Court, and later in their petition for rehearing argued that the Court "totally mistreats" the nonevidentiary issue in its opinion, again urging nonevidentiary use be barred, particularly in the context of the publicity that might be given immunized testimony where matters of public interest were concerned. Rehearing was denied. Brief for Petitioners at 38, *Kastigar v. United States*, 406 U.S. 441 (1972); Petition of Charles Joseph Kastigar and Michael Gorean Stuart, for Rehearing at 2-6, *Kastigar v. United States*, 406 U.S. 441 (1972).

has no evidentiary coherence or impact. Even more significant exposure is trivial where the fact is already known through independent evidence. Surely the law is built at least partly on common sense and it cannot be—contrary to defendants' assertions otherwise—that a prosecutor who inadvertently overhears mention of a fact already confirmed by his own independent investigation can be said to have made a prohibited use of immunized testimony. Clearly the defendants' Fifth Amendment rights are not then affected. Similarly, the defendants' Fifth Amendment rights are not infringed if a witness hears immunized testimony and yet testifies solely to facts personally known to the witness.

Even where extensive publicity was generated which included references to testimony given under use immunity, there is no basis for applying a different standard than that stated by the Supreme Court in considering the effect of use immunity on an individual defendant's Fifth Amendment rights.

The Court has not relied merely on general denials of taint by Independent Counsel. Nothing has developed in the Court's preliminary inquiry into *Kastigar* and related problems which suggests the defendants who received use immunity have had their Fifth Amendment rights impaired in a manner that significantly affects their right to a fair trial. The good faith of Independent Counsel cannot be questioned on this record and his candid testimony and the many documents reviewed by the Court leave no doubt that he maintained and continues to maintain a vigorous program aimed at minimizing the exposure of himself and his prosecutorial staff to immunized testimony. No improper evidentiary use of the immunized testimony has appeared.

Given these factual circumstances, it is not difficult to reach a preliminary decision that the case should proceed to trial.

In summary, based on this preliminary but thorough review of the testimony, documents and other materials listed in the Appendix, the Court finds and concludes that:

1. Defendants' immunized testimony was not submitted to the grand jury in any form.

2. The grand jurors were effectively warned not to read about or look at or listen to this immunized testimony and it played no part in the grand jury's unanimous decision to indict.

3. The grand jury transcript and exhibits reflect solid proof and ample probable cause to indict on each and every count.

4. None of the testimony or exhibits presented to the grand jury became known to the prosecuting attorneys on Independent Counsel's staff or to him personally either from the immunized testimony itself or from leads derived from the testimony, directly or indirectly.

5. The prosecuting attorneys and Independent Counsel have never read the immunized testimony.

6. Independent Counsel's staff was well aware through legitimate means of all significant witnesses to be called at trial and the essential documents long before any immunized testimony was given by the defendants; and, moreover, its investigators had been in direct contact with these witnesses.

7. The convening of a grand jury to consider possible criminal conduct of North and others was initiated by the Attorney General and grew out of the Attorney General's direct personal knowledge of possible criminal conduct. Immunization of the three defendants occurred much later and their immunized testimony did not serve to enhance the focus of Independent Counsel's investigation.

8. Independent Counsel has at all times proceeded in good faith taking strenuous precautions to safeguard the

moving defendants' Fifth Amendment rights at great inconvenience and expense.

9. A person granted use immunity receives no assurance he will not be prosecuted and no such assurance is claimed or demonstrated in this case.

10. Independent Counsel has preliminarily met his "heavy burden" under *Kastigar*, the inquiry has disclosed no action by the government that has infringed the protection granted each moving defendant against the direct or indirect use of his compelled testimony, and no basis has appeared pre-trial to warrant dismissal of any immunized defendant.

Defendants have fully preserved their rights as outlined in their original filing of April 7, 1988. (Motion to Dismiss Indictment for Violations of the Fifth Amendment and 18 U.S.C. § 6001 *et seq.* (Defendants' Joint Pretrial Motion No. 1)). These rights shall not be impaired by deferring further consideration of *Kastigar* issues to post-trial proceedings should such proceedings prove necessary. If such proceedings need be held, Independent Counsel's claim that much of the immunized testimony was volunteered and therefore not entitled to exclusion under *Kastigar* can also be considered. This waiver issue has played no part in this preliminary consideration of the *Kastigar* issues. The Court also notes that its previous Orders relating to severance remove the major *Kastigar* evidentiary problems that might otherwise have arisen during a joint trial of the four defendants.

Accordingly, Defendants' Joint Pretrial Motion No. 7 to dismiss pretrial or, in the alternative, to hold a full *Kastigar* hearing pretrial is denied.

SO ORDERED.

/s/ Gerhard A. Gesell
United States District Judge

June 16, 1988.

APPENDIX

The public and sealed materials relied on by the Court for the factual determinations made in this Memorandum are:

*[1](a) The in-court testimony of Judge Walsh on April 25 and 27, 1988, together with the exhibits filed at that hearing.

*(b) The transcribed portions of the grand jury proceedings, including all testimony given, various nontestimonial portions transcribed at the Court's request, and all grand jury exhibits.

*(c) The "Douglass file."

*(d) Two bound volumes of material establishing independent "leads" to all trial witnesses providing substantive information who may be called in the government's case-in-chief.

(e) Redacted newspaper clippings made available daily to Independent Counsel's prosecuting staff.

(f) Redacted congressional committee testimony made available to Independent Counsel's prosecuting staff.

*(g) The transcript of the voir dire of two replacement grand jurors by the Chief Judge.

*(h) Transcripts of eleven interviews of Richard V. Secord conducted by Independent Counsel between April 29, 1987 and March 12, 1988.

*(i) An index of all subpoenas issued during the course of this investigation.

*(j) Correspondence between Office of Independent Counsel and the United States Congress relating to the subject of use immunity and the relationship between the

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[1] The asterisks represent material sealed in whole or in part.

House and Senate Select Committees and Independent Counsel.

(k) Orders of the United States District Court for the District of Columbia granting Poindexter, North and Hakim use immunity for testimony before the Congressional Select Committees Investigating the Iran-contra affair.

(l) Orders issued by this Circuit's Special Division for the Purpose of Appointing Independent Counsels relating to the appointment of Lawernce E. Walsh as Independent Counsel in the matter of Lieutenant Colonel Oliver L. North, U.S.M.C., and others.

(m) April 10, 1987 Order issued by the Chief Judge authorizing the Clerk of Court to take custody of sealed "canned" material.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 88-0080-02

UNITED STATES OF AMERICA

v.

OLIVER L. NORTH

ORDER

[Filed July 13, 1988]

In light of developments that have occurred in this case as it moves toward trial and upon consideration of the motions set forth below, the oppositions and replies thereto, and the record herein, the Court rules as follows:

(1) Defendant's Motion for Reconsideration of Court's *Kastigar* Ruling and for a Full *Kastigar* Hearing (Defendant's Pretrial Motion No. 18) is denied.

(2) Defendant's Motion for Leave to Exceed Page Limit accompanying his Pretrial Motion No. 18 is granted.

(3) Defendant's Motion for a Hearing on Motion for Reconsideration accompanying his Pretrial Motion No. 18 is denied.

(4) Defendant's improperly captioned Motion to Strike from the Record the Court's Unjustified Criticism of Defense Counsel is denied.

(5) Defendant's Motion to Seal his Submission in Response to Court Suggestion of May 26, 1988 (filed under seal by defendant on June 28, 1988) is granted.

(6) Defendant's Motion to File Proffers Under Seal (filed under seal by defendant on June 28, 1988) is granted.

(7) The Attorney General having designated an Assistant Attorney General to carry out his functions and duties under the Classified Information Procedures Act (CIPA), defendants' Motion for a Declaration that the Independent Counsel Is Prohibited from Exercising the Powers of the Attorney General Under CIPA (Defendants' Joint Pretrial Motion No. 9) is denied as moot.

(8) Independent Counsel's motion for modification of the Court's Orders of June 14 and June 6, 1988 is granted in part pursuant to the Court's Scheduling Order of June 24, 1988.

(9) Motion of Defendants John M. Poindexter and Oliver L. North for Reconsideration of the Court's June 6, 1988, Order Denying Defendants' Supplemental Discovery Motion (Defendants' Joint Pretrial Motion No. 14) is granted in part as set forth in the Court's Further Memorandum and Order Re CIPA and Trial Schedule filed July 8, 1988.

(10) Defendant's Motion that Letters from Independent Counsel to the Court Be Made Part of the Record and that Further Communications Be Through Formal Pleadings (Defendant's Pretrial Motion No. 19) is denied. Defendant received copies of these letters which were reports to issues raised by the Court in open court. The Court has placed them in the jacket of this case (minus attachments).

(11) Defendant's Motion for an Order Directing the Independent Counsel to Provide List Identifying Classified Trial Exhibits to Be Redacted and Setting Forth

Contents of Proposed Redactions is denied as moot, Independent Counsel having provided the requested list and summary on July 5, 1988.

(12) Defendants' Motion to Compel Production of *Brady* Material (Defendants' Joint Pretrial Motion No. 17) is denied without prejudice to renewal after August 1, 1988, if defendant has cause to believe the resolution suggested by the Court in open court has not been achieved.

(13) The July 11, 1988, date for filing of defendant North's CIPA Section 5 notice is cancelled.

(14) The July 14, 1988, hearing scheduled pursuant to the Court's Memorandum and Preliminary Order Re CIPA (filed June 22, 1988) is cancelled.

SO ORDERED.

/s/ Gerhard A. Gesell
United States District Judge

July 13, 1988.